

## RIVIERA DRILLING & EXPLORATION

IBLA 84-722

Decided June 27, 1985

Appeal from a decision of the Montrose District Office, Colorado, Bureau of Land Management, in part affirming two notices of incidents of noncompliance and the levy of an assessment with respect to operation of wells on noncompetitive oil and gas leases. C 10-90-31 through C 10-90-34.

Affirmed as modified.

1. Bureau of Land Management -- Mineral Leasing Act: Generally -- Oil and Gas Leases: Noncompetitive Leases -- Public Lands: Jurisdiction Over -- Public Lands: Leases and Permits

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

2. Bureau of Land Management -- Mineral Leasing Act: Generally -- Oil and Gas Leases: Noncompetitive Leases -- Rules of Practice: Appeals: Hearings

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

APPEARANCES: Bruce G. Miller, Esq., and Mark A. Kling, Esq., Denver, Colorado, for appellant.

### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Riviera Drilling & Exploration (Riviera) has appealed from a decision of the Montrose District Office, Colorado, Bureau of Land Management (BLM), dated June 4, 1984, in part affirming a decision which levied an assessment

for failure to abide with the conditions stated in two notices of incidents of noncompliance (INC) with respect to the operation of oil and gas wells C 10-90-31 through C 10-90-34 on Federal noncompetitive oil and gas leases.<sup>1/</sup>

The earliest document contained in the file regarding the facts which led to the issuance of the INC's and subsequent June 1984 BLM decision was a letter to appellant, dated February 17, 1984, from the District Ranger, Forest Service, which summarized the items of discussion at a February 16 meeting between representatives of the Forest Service and appellant. This letter stated in part that the access road to well C 10-90-31 "needs additional gravel to replace that which has been lost due to rutting." The District Ranger concluded this resurfacing "should be accomplished within a day or two of when snow melts from the roadbed." The District Ranger also stated that "[r]eserve pit fluids and residue are to be hauled by March 1, 1984," and that "[i]f weather conditions permit operations beyond this time frame, then removal of these substances must be kept current," with respect to oil and gas wells C 10-90-31 through C 10-90-34.

#### Road Maintenance

On March 6, 1984, BLM issued an INC based on a finding that the access road to a drilling operation being conducted by appellant "has not been regaveled as soon as [the] snow melted off, as agreed upon in a meeting between appellant and representatives of the U.S. Forest Service on Feb. 16, 1984." BLM directed appellant to correct the deficiency within 7 days of receipt of the notice. By letter dated March 14, 1984, BLM informed appellant that the access road would be closed to heavy vehicular traffic after March 16, 1984, because of the spring thawing conditions. On March 22, 1984, the District Ranger, Forest Service, sent written notice to BLM that appellant had ceased its operations with respect to well C 10-90-31 on March 16, 1984. This notice also stated there had been no repair of the access road at the time of writing. The District Ranger recommended assessment of penalties from the date of the INC deadline to the date of closure, i.e., March 13 to March 16, 1984. The District Ranger also recommended that the INC issued for failure to gravel the road should be suspended "[b]eyond this time period" until weather and road conditions permit reentry into the area for road repair.

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<sup>1/</sup> Riviera is the designated agent of Piute Energy Company, the unit operator for the Ragged Mountain unit, which includes oil and gas wells C 10-90-31 through C 10-90-33, and the operator of oil and gas well C 10-90-34. Oil and gas wells C 10-90-31 through C 10-90-34 are situated, respectively, in the NW 1/4 SE 1/4 sec. 31, SW 1/4 SE 1/4 sec. 32, NW 1/4 SE 1/4 sec. 33, and SW 1/4 SE 1/4 sec. 34, T. 10 S., R. 90 W., sixth principal meridian, Gunnison County, Colorado, within noncompetitive oil and gas leases C-13602, C-13601, and C-16186. The land is under the jurisdiction of the Forest Service, U.S. Department of Agriculture, and is situated in the Paonia Ranger District.

By letter dated March 30, 1984, BLM notified appellant that it was "assessing a penalty" of \$ 250 per day for the 3-day period, March 14 through 16, 1984, for failure to exercise due care in preventing undue damage to surface resources as required by 43 CFR 3163.3(g). 2/ 3/ BLM also informed appellant that it was entitled to a technical and procedural review under 43 CFR 3165.3. On April 9, 1984, appellant requested a review.

On May 10, 1984, after having given notice to appellant that he intended to do so, the Montrose District Manager, BLM, conducted a technical and procedural review with respect to the road INC as well as the reserve pit INC discussed later in this opinion. A representative of appellant was present at the hearing but chose not to participate. The only evidence introduced was the two INC's. After introduction of this evidence, the District Manager concluded the hearing but left the record open until May 21, 1984, to give appellant an opportunity to submit any evidence appellant might deem appropriate. No evidence was submitted.

In its June 4, 1984 decision, the Montrose District Manager, BLM, affirmed the INC issued for failure to resurface the access road to well C 10-90-31, as required by the supplemental stipulations to the application for permit to drill (APD). This stipulation required that roads be maintained before, during, and after operations. In addition, BLM affirmed the levy of an assessment because no spot graveling had taken place by the INC deadline stated on the face of the INC.

We believe it appropriate at this point to summarize the events leading to the appeal of the INC for failure to maintain the road. On February 16, 1984, discussions were held between appellant and Forest Service personnel regarding the need to maintain the road to appellant's well site. On March 6, 1984, BLM issued an INC for failure to maintain the road, citing the items discussed in the February 16 meeting as a basis for the INC. The INC gave appellant 7 days, or until March 13, 1984, to do the necessary repairs. Appellant made no repairs and quit the project on March 16, 1984.

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2/ The regulations pertaining to assessments under 43 CFR Subpart 3163 were amended effective Oct. 22, 1984, to implement the applicable portions of the Federal Oil and Gas Royalty Management Act of 1982. See 49 FR 37356 (Sept. 21, 1984). However, the Department suspended these new regulations by notice issued Mar. 22, 1985. 50 FR 11517. In order to avoid confusion all references in this opinion are to provisions of 43 CFR Subpart 3163 in effect prior to amendment, unless otherwise noted.

3/ The difficulty of this case is in no way diminished by the free interchange of the terms "assessment" and "penalty" in the decision documents under review. The difference is important, however. The levy of assessments is governed by 43 CFR 3163.3 and the imposition of penalties is governed by 43 CFR 3163.4. While both may result in monetary payments, the appeal procedures differ. All references to regulatory provisions regarding the basis for monetary impositions in the decision under appeal were to 43 CFR 3163.3 or to the section dealing with assessments. This opinion will be so couched.

On March 30, 1984, BLM notified appellant that, pursuant to 43 CFR 3163.3, it was "assessing a penalty" (levying an assessment, see note 2) based upon appellant's failure to do the work prior to March 13, 1984. The "penalty" was levied for the 3-day period, March 13 through March 16. On May 10, 1984, the District Manager, BLM, reviewed the actions leading to the assessment of a penalty. On June 4, 1984, the District Manager issued a decision which upheld the Area Manager's decision.

Appellant filed a notice of appeal from the June 4, 1984, decision. In its statement of reasons for appeal, appellant contends the INC was "unreasonable and illegal," the assessment with respect to the failure to resurface the access road was improper, and the hearing was inadequate to form a basis for the June 1984 BLM decision affirming the INC and assessment. Appellant argues BLM did not have authority to issue the INC because the land is under the jurisdiction of the Forest Service.

Appellant also argues the INC was improper because it was "vague" as to the nature of the alleged incidents of noncompliance and the method for correcting the violations. <sup>4/</sup> We agree that the applicable INC does not clearly specify the nature of the incident of noncompliance or the method of correction. The INC states: "Access road to well No. 10-90-31 has not been regraveled as soon as snow melted off, as agreed upon Feb. 16, 1984. Note: This work to be done on frozen ground only." As can be seen, the notice does not specify where the gravel should have been placed. However, the February 17 letter which memorializes the conversation between representatives of the Forest Service and appellant indicates this topic was discussed and photographs in the file indicate obvious breakup of the road at the locations photographed.

Based upon the record now before us, appellant is hard pressed to argue ignorance of the facts. Had appellant attempted compliance by graveling those portions of the road deemed by it to require gravel and subsequently been assessed for failure to adequately gravel the road, we might be inclined to find greater merit in its argument. However, the record indicates appellant neither took any corrective measures by placing gravel at any point on the access road to well C 10-90-31, nor sought clarification of the INC.

Appellant also argues that BLM was required to abide by the provisions of the road use permit for the access road which was issued by the Forest Service. This permit required notice and 90 days to replace gravel bladed off in connection with snow removal. However, the INC was not issued to enforce the provisions of the Forest Service road use permit, but was issued

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<sup>4/</sup> Appellant also argues the INC notices were not signed by an "authorized officer," were not on an approved form, and were improperly completed because references to Survey were stricken and in some cases "BLM" was inserted. However, there is no evidence the BLM employee signing the notices was not authorized to do so or that the form used had not been approved. The completed form is not a model of formality but is otherwise clear.

to enforce the terms of the lease. BLM has independent authority under the terms of the lease to protect against undue environmental damage and to enforce lease provisions. 43 CFR 3163.1; 3163.3(g).

Appellant next argues that the INC's were in excess of BLM's authority because they sought to enforce "agreements" with the Forest Service, of which appellant had no knowledge. 43 CFR 3163.1 provides that the "authorized officer" has the authority to assess penalties and/or liquidated damages in cases of specific instances of noncompliance where there is a failure to comply with "written orders or instructions issued by the authorized officer." 43 CFR 3161.2 permits the authorized officer to issue oral orders, which must be confirmed in writing "within 10 working days from issuance thereof." However, BLM could not cite appellant for failure to comply with a written order by a party other than an "authorized officer." Prior to issuance of the INC's, the only applicable written "order" had been issued by a Forest Service, not a BLM, representative. Accordingly, no assessment could be levied by BLM for noncompliance with the February 17, 1984, letter written by the District Ranger, Forest Service.

Notwithstanding the fact that a Forest Service employee could not give the notice with respect to noncompliance with the lease because of failure to maintain the access road, the incident of noncompliance was a failure to exercise due care in preventing undue damage to surface resources, as required by 43 CFR 3162.5-1(b), and the terms of the permit to drill, within the time period specified in the INC issued by an authorized officer. Accordingly, on March 6, 1984, BLM could properly issue an INC directing appellant to regravels the access road. The subsequent assessment was levied pursuant to 43 CFR 3163.3(g) for appellant's failure to exercise due care in preventing undue damage to surface or subsurface resources, when it failed to comply within the period set forth in the INC. The assessment was levied for the period from the INC deadline date to the date appellant's operations were shut down. This decision was within BLM's discretion. See 43 CFR 3163.1. The record contains sufficient evidence to sustain a determination that there was significant damage to the access road resulting from appellant's failure to resurface the road. Appellant has presented no evidence to the contrary. Cf. Chinook Resources, 85 IBLA 5 (1985).

#### Removal of Reserve Pit Fluids

On March 6, 1984, BLM issued a second INC based upon its determination that the "[r]eserve pit fluids and materials have not been removed by 'the agreed upon date,' March 1, 1984, and new fluids produced since March 1, 1984, have not been removed concurrent with operations as agreed." BLM directed appellant to correct the deficiency within 10 days of receipt of the notice.

By letter dated March 14, 1984, BLM informed appellant that if the reserve pit fluids were not removed by March 16, 1984, (10 days after issuance of the INC), a special use permit issued by the Forest Service might be necessary for hauling reserve pit fluids. It was anticipated that after March 16, removal of pit fluids would be allowed only during nighttime hours, when the ground was sufficiently frozen to prevent rutting. On March 22,

1984, the Forest Service granted a special use permit to appellant allowing the removal of reserve pit fluids for a period ending April 1, 1984, and stating the hours during which this activity could take place. On March 22, 1984, the District Ranger, Forest Service, sent written notice to BLM that no reserve pit fluids had been removed since the March 6 issuance of the INC and that it was his opinion that this constituted a "serious threat" to adjacent creeks. The District Ranger recommended assessment of penalties for the "total time of noncompliance."

By letter dated April 6, 1984, BLM notified appellant that it was levying an assessment of \$ 250 per day for the 17-day period between March 17 and April 2, 1984, for appellant's failure to exercise due care in preventing undue damage to surface resources under the provision of 43 CFR 3163.3(g). BLM also informed appellant that it was entitled to a technical and procedural review under 43 CFR 3165.3.

The INC for failure to remove materials and fluids from the reserve pits was also made a part of the record in the May 10, 1984, technical and procedural review by the District Manager. After reviewing the administrative record, on June 6, 1984, the District Manager issued a decision regarding the pit fluid removal INC which was incorporated with his June 6, 1984, decision regarding the road maintenance INC.

In his decision the District Manager upheld the issuance of the INC for failure to remove pit fluids, noting the supplemental stipulations to the APD's also required that the pits have adequate storage capacity to safely contain all produced water and that the pits be constructed, maintained, and operated to prevent unauthorized surface discharges of water. He then stated that a monetary assessment could properly have been levied under 43 CFR 3163.3(a) for failure to comply with a written order or instruction by an authorized officer within the time period specified in the order.

The District Manager also found, however, that there was an absence of actual damage to surface or subsurface resources as a result of the failure to remove the pit fluids within the time specified in the INC. The District Manager modified the April 5, 1984, decision of the Area Manager, waived the assessment with respect to this INC, and directed appellant to take certain additional action in order to remedy the underlying incident of noncompliance:

If a complete Sundry Notice for the disposal of pit fluids is not on file with this office, Riviera has 48 hours from receipt of this decision to submit one. A complete Sundry Notice shall include a disposal pit certification and evidence of contract that the disposal pit operator will accept pit fluids. Riviera will have 24 hours to begin hauling pit fluids after receiving the approved Sundry Notice. Pits that are no longer needed will be pumped dry and rehabilitated according to approved plans. Pits still being used will be maintained and operated to prevent unauthorized surface discharges and to provide adequate storage capacity for containment of all produced water. At least three feet of free board will be maintained at all times.

(June 4, 1984, decision at 3.)

Again, we find it appropriate to summarize the events leading to the appeal from that portion of the June 6 decision addressing the failure to remove pit fluids. On February 17, 1984, the District Ranger sent a letter to appellant stating that reserve pit fluids were to be removed by March 1, 1984. After appellant's failure to remove the pit fluids, BLM issued an INC on March 6, 1984, directing appellant to remove reserve pit fluids within 10 days. On March 14, 1984, BLM advised appellant that a Forest Service special use permit may be required for removal after March 16, 1984. Appellant obtained a permit on March 22, 1984. On the same day the Forest Service advised BLM that no fluids had been removed since March 6, and recommended the assessment of penalties. On April 2, 1984, BLM notified appellant that it was assessing penalties because no reserve pit fluids had been removed. On May 10, 1984, the District Manager conducted a review of the issuance of the INC. On June 4 the District Manager issued a decision vacating the levy of an assessment, and directing appellant to remove the pit fluids.

Appellant also filed notice of appeal from this portion of the BLM decision. In its statement of reasons appellant argues that its obligation to remove reserve pit fluids was expressly contingent on the availability of a particular disposal site and accessibility to the site. Appellant concludes that it was relieved of its obligation to remove the reserve pit fluids by closure of the disposal site and the access roads.

The act of noncompliance was failure to remove the reserve pit fluids between March 17 and April 2, 1984. While the access roads were closed on March 16, 1984, the District Ranger, Forest Service, granted appellant permission to use access roads to remove reserve pit fluids through April 1, 1984.

Appellant contends the INC was vague and thus should not be enforced. With respect to the reserve pit fluids, we conclude that the INC clearly stated that appellant had failed to remove fluids and materials. The INC would have been abated by the removal of fluids and materials. 5/ The time for correction was unmistakably clear.

The record also indicates appellant was relying on a particular disposal site which was closed by the county. However, there is no evidence that appellant's obligation to remove reserve pit fluids was expressly contingent on the availability of this site or that there was no other site available. In fact, the applicable INC was not made contingent upon the availability of the county disposal site.

Notwithstanding the fact that the record discloses that between February 17, 1984 and April 1, 1984, appellant had ample opportunity to remove reserve pit fluids and did not do so, the District Manager, BLM,

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5/ Appellant argues that the term "materials" in the INC is vague. This argument has little merit, considering the purpose of the pits, their condition at the time of issuance of the INC, and appellant's refusal or failure to remove anything contained in the pit, thus lowering the fluid level.

determined it to be advisable to waive the assessment and allow appellant further time for removal of pit fluids and materials.

[1] Oil and gas leases for lands situated within a national forest are issued by BLM. See 30 U.S.C. §§ 181, 226 (1982), 43 CFR Part 3100; Chevron Oil Co., 24 IBLA 159 (1976). Similarly, the management of onshore operations under oil and gas leases is committed to the Secretary of the Interior, who has the power to delegate certain management functions to BLM. See Right-of-Way Requirements for Gathering Lines and Other Production Facilities Located Within Oil and Gas Leaseholds, Solicitor's Opinion, 87 I.D. 291, 302 (1980); 43 CFR 3160.0-2. Day-to-day operations are "under the direction of the authorized officer having jurisdiction of the leased lands" subject to the supervisory authority of the Director, BLM. 43 CFR 3161.1. This authorized officer also has the authority to remedy incidents of noncompliance with applicable law, lease terms, approved operating plans, or "written orders or instructions" issued by him. 43 CFR 3163.1. This authority must necessarily include the authority to issue an INC. <sup>6/</sup> While the regulations do not define the term "authorized officer," this term clearly means an officer under the supervision of the Director, BLM. An employee of the Forest Service does not qualify as an "authorized officer." See Forest Exchanges, 60 I.D. 232 (1948).

[2] Appellant also contends it was not properly notified of its right to a "hearing" under 43 CFR 3165.3 with respect to the INC's at the time of issuance. This regulation provides in pertinent part: "A lessee or operator may request a technical and procedural review of any instructions, orders, or decisions issued by the authorized officer under the regulations in this part." The request must be filed within 10 working days of receipt of the particular document sought to be reviewed. It is true the INC's and the March 14, 1984, decision did not advise appellant of the above-outlined procedure. However, appellant was apprised of this right by the March 30, 1984 and April 6, 1984, decisions. Following these decisions a technical and procedural review took place. Any perceived error was subsequently overcome, and appellant cannot now contend that this right was not extended to it.

The record indicates that appellant did request a "hearing" with respect to the INC concerning the access road and that a "technical and procedural review" of both INC's was, in fact, subsequently conducted by the District Manager. The conduct of a technical and procedural review is governed by 43 CFR 3165.3, which provides that the technical and procedural review of any instructions, orders, or decisions issued are to be reviewed by a reviewing official, and that decisions issued upon review will represent the final agency decision from which an appeal may be taken under 43 CFR Part 4. There is, however, no designation of who is to act as the "reviewing official." At

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<sup>6/</sup> BLM will have the right to invoke the provisions of 43 CFR 3163.4-1 if appellant fails to comply with the District Manager's determination. See 43 CFR 3163.4-1(a)(2) (1984) as that provision is now in effect.



the time of the review that responsibility had been delegated to the District Manager. 7/ See Beartooth Oil and Gas Co., 85 IBLA 11 (1985).

Finally, appellant contends the June 4, 1984, decision is not supported by evidence introduced at the May 10, 1984, hearing, and that evidence not introduced cannot be considered. Appellant states that documentation outside the record of the hearing "must be excluded as incompetent and insufficient evidence" (Statement of Reasons at 4). Riviera concludes, "[B]ecause the transcript of the review does not support BLM's decision, the INC's and assessments must be cancelled and the decision of BLM stricken." Id.

As previously noted, the May 10 hearing held in conjunction with BLM's technical and procedural review was brief. After introducing the INC's the reviewing official noted that he had been informed by appellant's counsel that appellant did not intend to participate. He then concluded the proceeding, but held "the case record open for input by Riviera Drilling \* \* \* until noon on Monday, May 21st" (Tr. at 3).

Riviera has misperceived the nature and purpose of a technical and procedural review. It is obvious from reading 43 CFR 3165.3 that it was not contemplated that a technical and procedural review would be tantamount to a formal adjudicatory hearing. In fact, no hearing, no matter how informal, need be held. The regulation contemplates a review of the entire record by the reviewing official for a determination as to whether the record supports the technical findings stated in the instruction, order, or decision issued by the authorized officer and whether the authorized officer followed proper procedure when issuing the instruction, order, or decision. The reviewing official is not limited to that information presented at a "hearing." In fact, the hearing official has the right to call for additional information to supplement the record, which is open to inspection by the operator. See 43 CFR Part 2. On the other hand, it would have been objectionable for the reviewing official to have limited his review to that evidence presented at the "hearing" held on May 10, 1984. It is obvious from his opinion he did not.

The decision of the District Manager found there were sufficient grounds for the levy of assessments for failure to comply with the instructions given by Forest Service personnel. To the extent his decision relied on directives issued by a party other than the appropriate authorized officer, it must be modified. There is, however, sufficient evidence in the record that appellant failed to abate noncompliance with the permit to drill regarding road maintenance, in accordance with an order issued by an authorized BLM officer in the form of an INC. Accordingly, the decision of the District Manager is modified to reflect that appellant is subject to the levy of an assessment because of its failure to comply with the road maintenance INC within the period specified. Thus, the levy of a \$ 750 assessment is upheld. With

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7/ In the subsequent amendment to 43 CFR Subpart 3163 the designation of a "reviewing official" for a technical and procedural review of an assessment was essentially unchanged. However, the provisions of 43 CFR 3163.4 specifically provide that the review of a decision to impose a penalty is to be conducted by the State Director.

[\*366] respect to the determination regarding the pit fluid INC, we find the decision below is supported by the evidence and within the scope of authority of the reviewing official. That determination is also upheld. Appellant has failed to carry its burden of showing error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, as modified herein.

R. W. Mullen  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Gail M. Frazier  
Administrative Judge

